

S. 96 Amdt.

AMENDMENT NO.

CAL. NO.

STAFF WORKING DRAFT

FOR DISCUSSION PURPOSES ONLY

February 23, 1999

Purpose: To regulate interstate commerce by making provision for dealing with losses arising from Year 2000 Problem-related failures that may disrupt communications, intermodal transportation, and other matters affecting interstate commerce.

IN THE SENATE OF THE UNITED STATES\_ 106 th Cong., 1 st Sess.

S. 96, 106 th Congress, 1 st Session

February \_\_, 1999

( ) Referred to the Committee on \_\_\_\_\_ and ordered to be printed

( ) Ordered to lie on the table and to be printed

Intended to be proposed by Mr. McCain (for himself and Mr. Gorton)

Viz: Strike out all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE; TABLE OF SECTIONS.

(a) Short Title.\_ This Act may be cited as the ``Y2K Act".

(b) Table of Sections.\_ The table of sections for this Act is as follows:

Sec. 1. Short title; table of sections.

Sec. 2. Findings and purposes.

Sec. 3. Definitions.

Sec. 4. Application of Act.

Sec. 5. Punitive damages limitations

#### Title I\_Opportunity to Resolve Y2K Problems

Sec. 101. Pre-filing notice

Sec. 102. Pleading requirements

Sec. 103. Duty to mitigate

Sec. 104. Proportionate liability

#### Title II\_Y2K Actions Involving Contract-related Claims

Sec. 201. Contracts enforced

Sec. 202. Defenses.

Sec. 203. Damages limitation

Sec. 204. Mixed actions

#### Title III\_Y2K Actions Involving Tort Claims

Sec. 301. Damages in tort claims

Sec. 302. Certain defenses

Sec. 303. Liability of officers and directors

#### Title IV\_Y2K Class Actions

Sec. 401. Minimum injury requirement

Sec. 402. Notification

Sec. 403. Forum for Y2K class actions

## SEC. 2. FINDINGS AND PURPOSES.

The Congress finds that:

(1) The majority of responsible business enterprises in the United States are committed to working in cooperation with their contracting partners towards the timely and cost-effective resolution of the many technological, business, and legal issues associated with the Y2K date change.

(2) Congress seeks to encourage businesses to concentrate their attention and

resources in short time remaining before January 1, 2000, on addressing, assessing, remediating, and testing their Y2K problems, and to minimize any possible business disruptions associated with the Y2K issues.

(3) It is appropriate for the Congress to enact legislation to assure that Y2K problems do not unnecessarily disrupt interstate commerce or create unnecessary caseloads in Federal courts and to provide initiatives to help businesses prepare and be in a position to withstand the potentially devastating economic impact of Y2K.

(4) Y2K issues will potentially affect practically all business enterprises to at least some degree, giving rise possibly to a large number of disputes.

(5) Resorting to the legal system for resolution of Y2K problems is not feasible for many businesses, particularly small businesses, because of its complexity and expense.

(6) The delays, expense, uncertainties, loss of control, adverse publicity and animosities that frequently accompany litigation of business disputes can only exacerbate the difficulties associated with the Y2K date change, and work against the successful resolution of those difficulties.

(7) Congress recognizes that every business in the United States should be concerned that widespread and protracted Y2K litigation may threaten the network of valued and trusted business relationships that are so important to the effective functioning of the world economy, and which may put unbearable strains on an overburdened and sometime ineffective judicial system.

(8) A proliferation of frivolous Y2K lawsuits by opportunistic parties may further limit access to courts by straining the resources of the legal system and depriving deserving parties of their legitimate rights to relief.

(9) Congress encourages businesses to approach their Y2K disputes responsibly, and to avoid unnecessary, time-consuming and costly litigation about Y2K failures, particularly those that are not material. Congress supports good faith negotiations between parties when there is a dispute over a Y2K problem, and, if necessary, urges the parties to enter into voluntary, non-binding mediation rather than litigation.

### SEC. 3. DEFINITIONS.

In this Act:

(1) Y 2 K action.\_ The term ``Y2K action" means a civil action commenced in any Federal or State court in which the plaintiff's alleged harm or injury resulted directly or indirectly from an actual or potential Y2K failure, or a claim or defense of a defendant is related directly or indirectly to an actual or potential Y2K failure.

(2) Y 2 K failure.\_ The term ``Y2K failure" means failure by any device or system (including any computer system and any microchip or integrated circuit embedded in another device or product), or any software, firmware, or other set or collection of processing instructions to process, to calculate, to compare, to sequence, to display, to store, to transmit, or to receive date-related data, including failures\_

(A) to deal with or account for transitions or comparisons from, into, and between the years 1999 and 2000 accurately;

(B) to recognize or accurately process any specific date in 1999, 2000, or 2001; or

(C) accurately to account for the year 2000's status as a leap year, including recognition and processing of the correct date on February 29, 2000.

(3) Actual damages.\_ The term ``actual damages" means direct damages for injury to tangible property, and the cost of repairing or replacing products that have a material defect.

(4) Economic loss.\_ Except as otherwise specifically provided in a written contract between the plaintiff and the defendant in a Y2K action (and subject to applicable State law), the term ``economic loss"\_

(A) means amounts awarded to compensate an injured party for any loss other than for personal injury or damage to tangible property (other than property that is the subject of the contract); and

(B) includes amounts awarded for\_

(i) lost profits or sales;

(ii) business interruption;

(iii) losses indirectly suffered as a result of the defendant's wrongful act or omission;

(iv) losses that arise because of the claims of third parties;

(v) losses that must be pleaded as special damages; and

(vi) consequential damages (as defined in the Uniform Commercial Code or analogous State commercial law); but

(C) does not include actual damages.

(5) Material defect.\_ The term ``material defect" means a defect in any item, whether tangible or intangible, or in the provision of a service, that substantially prevents the

item or service from operating or functioning as designed or intended. The term ``material defect" does not include a defect that\_

(A) has an insignificant or de minimis effect on the operation or functioning of an item or computer program;

(B) affects only on a component of an item or program that, as a whole, substantially operates or functions as designed; or

(C) has an insignificant or de minimis effect on the efficacy of the service provided.

(6) Personal injury.\_ The term ``personal injury"\_

(A) means any physical injury to a natural person, including death of the person; but

(B) does not include mental suffering, emotional distress, or like elements of injury that do not constitute physical harm to a natural person.

(7) State.\_ The term ``State" means any State of the United States, the District of Columbia, Commonwealth of Puerto Rico, the Northern Mariana Islands, the United States Virgin Islands, Guam, American Samoa, and any other territory or possession of the United States, and any political subdivision thereof.

(8) Contract.\_ The term ``contract" means a contract, tariff, license, or warranty.

(9) Person.\_

(A) In general.\_ The term ``person" has the meaning given to that term by section 1 of title 1, United States Code.

(B) Government entities.\_ The term ``person" includes an agency, instrumentality, or other entity of Federal, State, or local government (including multijurisdictional agencies, instrumentalities, and entities) when that agency, instrumentality, or other entity is a plaintiff or a defendant in a Y2K action.

(10) Alternative dispute resolution.\_ The term ``alternative dispute resolution" means any process or proceeding, other than adjudication by a court or administrative proceeding, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration.

#### SEC. 4. APPLICATION OF ACT.

(a) General Rule.\_ This Act applies to any Y2K action brought in a State or Federal court after February 22, 1999.

(b) No New Cause of Action Created.\_ Nothing in this Act creates a new cause of action under Federal or State law.

(c) Actions for Personal Injury or Wrongful Death Excluded.\_ This Act does not apply to a claim for personal injury or for wrongful death.

(d) Written Contract Controls.\_ The provisions of this Act do not supersede a valid, enforceable written contract between a plaintiff and a defendant in a Y2K action.

(e) Preemption of State Law.\_ This Act supersedes State law to the extent that it establishes a rule of law applicable to a Y2K action that is inconsistent with State law.

## SEC. 5. PUNITIVE DAMAGES LIMITATIONS.

(a) In General.\_ In any Y2K action in which punitive damages may be awarded under applicable State law, the defendant shall not be liable for punitive damages unless the plaintiff proves by clear and convincing evidence that the defendant acted with conscious and flagrant disregard for the rights and property of others.

(b) Caps on Punitive damages.\_

(1) In general.\_ Punitive damages against a defendant in such a Y2K action may not exceed the larger of\_

(A) 3 times the amount awarded for actual damages; or

(B) \$250,000.

(2) Special rule.\_ In the case of a defendant\_

(A) who\_

(i) is sued in his or her capacity as a individual; and

(ii) whose net worth does not exceed \$500,000; or

(B) that is an unincorporated business, a partnership, corporation, association, unit of local government, or organization with fewer than 25 full-time employees,

paragraph (1) shall be applied by substituting ``smaller" for ``larger".

(c) Government entities.\_ Punitive damages in such a Y2K action may not be awarded against a person described in section 3(8)(B).

## TITLE I\_OPPORTUNITY TO RESOLVE Y2K PROBLEMS.

## SEC. 101. PRE-FILING NOTICE.

(a) In General.\_ Before commencing a Y2K action, except an action that seeks only injunctive relief, a prospective plaintiff with a Y2K claim shall serve on each prospective defendant in that action a written notice that identifies with particularity\_

(1) the manifestations of any material defect alleged to have caused harm or loss;

(2) the harm or loss allegedly suffered by the prospective plaintiff;

(3) the remedy sought by the prospective plaintiff;

(4) the basis upon which the prospective plaintiff seeks that remedy; and

(5) the name, title, address, and telephone number of any individual who has authority to negotiate a resolution of the dispute on behalf of the prospective plaintiff.

(b) Delay of Action.\_ Except as provided in subsection (d), a prospective plaintiff may not commence a Y2K action in Federal or State court until the expiration of 90 days from the date of service of the notice required by subsection (a).

(c) Response to Notice.\_ Within 30 days after receipt of the notice specified in subsection (a), each prospective defendant shall serve on each prospective plaintiff a written statement acknowledging receipt of the notice, and proposing the actions it has taken or will take to address the problem identified by the prospective plaintiff. The written statement shall state whether the prospective defendant is willing to engage in alternative dispute resolution.

(d) Failure to Respond.\_ If a prospective defendant\_

(1) fails to respond to a notice provided pursuant to subsection (a) within the 30 days specified in subsection (c); or

(2) does not describe the action, if any, the prospective defendant will take to address the problem identified by the prospective plaintiff,

then the 90-day period specified in subsection (a) will terminate at the end of the 30-day period as to that prospective defendant and the prospective plaintiff may commence its action against that prospective defendant.

(e) Failure to Provide Notice.\_ If a defendant determines that a plaintiff has filed a Y2K action without providing the notice specified in subsection (a) and without awaiting the expiration of the 90-day period specified in subsection (a), the defendant may treat the plaintiff's complaint as such a notice by so informing the court and the plaintiff. If any defendant elects to treat the complaint as such a notice\_

(1) the court shall stay all discovery and all other proceedings in the action for 90 days after filing of the complaint; and

(2) the time for filing answers and all other pleadings shall be tolled during this 90-day period.

(f) Effect of Contractual Waiting Periods.\_ In cases in which a contract requires notice of nonperformance and provides for a period of delay prior to the initiation of suit for breach or repudiation of contract, the period of delay provided in the contract is controlling over the waiting period specified in subsections (a) and (e).

(g) State Law Controls Alternative Methods.\_ Nothing in this section supersedes or otherwise preempts any State law or rule of civil procedure with respect to the use of alternative dispute resolution for Y2K actions.

#### SEC. 102. PLEADING REQUIREMENTS.

(a) Nature and Amount of Damages.\_ In all Y2K actions in which damages are requested, the complaint shall provide specific information as to the nature and amount of each element of damages and the factual basis for the damages calculation.

(b) Material Defects.\_ In any Y2K action in which the plaintiff alleges that a product or service is defective, the complaint shall contain specific information regarding the manifestations of the material defects and the facts supporting a conclusion that the defects are material.

(c) Required State of Mind.\_ In any Y2K action in which a claim is asserted on which the plaintiff may prevail only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each element of that claim, state with particularity the facts giving rise to a strong inference that the defendant acted with the required state of mind.

#### SEC. 103. DUTY TO MITIGATE.

Damages awarded in any Y2K action shall exclude compensation for damages the plaintiff could reasonably have avoided in light of any disclosure or other information of which the plaintiff was, or reasonably could have been, aware, including reasonable efforts made by a defendant to make information available to purchasers or users of the defendant's product or services concerning means of remedying or avoiding Y2K failure.

#### SEC. 104. PROPORTIONATE LIABILITY.

(a) In General.\_ A person against whom a final judgment is entered in a Y2K action shall be liable solely for the portion of the judgment that corresponds to the relative and proportional liability of that person. In determining the percentage of responsibility of any defendant, the trier of fact shall determine that percentage as a percentage of the total fault of all persons, including the plaintiff, who caused or contributed to the total



loss incurred by the plaintiff.

(b) Several Liability.\_ Liability in a Y2K action shall be several but not joint.

## TITLE II\_Y2K ACTIONS INVOLVING CONTRACT-RELATED CLAIMS

### SEC. 201. CONTRACTS ENFORCED.

In any Y2K action, any written term or condition of a valid and enforceable contract between the plaintiff and the defendant, including limitations or exclusions of liability and disclaimers of warranty, is fully enforceable, unless the court determines that the contract as a whole is unenforceable. If the contract is silent with respect to any matter, the interpretation of the contract with respect to that matter shall be determined by applicable law in force at the time the contract was executed.

### SEC. 202. DEFENSES.

(a) Reasonable Efforts.\_ In any Y2K action in which breach of contract is alleged, in addition to any other rights provided by applicable law, the party against whom the claim of breach is asserted shall be allowed to offer evidence that its implementation of the contract, or its efforts to implement the contract, were reasonable in light of the circumstances for the purpose of limiting or eliminating the defendant's liability.

(b) Impossibility or Commercial Impracticability.\_ In any Y2K action in which breach of contract is alleged, applicability of the doctrines of impossibility and commercial impracticability shall be determined by applicable law in existence on January 1, 1999, and nothing in this Act shall be construed as limiting or impairing a party's right to assert defenses based upon such doctrines.

### SEC. 203. DAMAGES LIMITATION.

In any Y2K action for breach or repudiation of contract, no party may claim, nor be awarded, consequential or punitive damages unless such damages are allowed\_

(1) by the express terms of the contract; or

(2) if the contract is silent on such damages, by operation of State law at the time the contract was executed or by operation of Federal law.

### SEC. 204. MIXED ACTIONS.

If a Y2K action includes claims based on breach of contract and tort or other noncontract claims, then this title shall apply to the contract-related claims and title III shall apply to the tort or other noncontract claims.

## TITLE III\_Y2K ACTIONS INVOLVING TORT CLAIMS

### SEC. 301. DAMAGES IN TORT CLAIMS.

A party to a Y2K action making a tort claim may not recover damages for economic

loss unless\_

(1) the recovery of such losses is provided for in a contract to which the party seeking to recover such losses is a party;

(2) such losses result directly from a personal injury claim resulting from the Y2K failure; or

(3) such losses result directly from damage to tangible property caused by the Y2K failure (other than damage to property that is the subject of the contract),

and such damages are permitted under applicable Federal or State law.

#### SEC. 302. CERTAIN DEFENSES.

(a) Good Faith; Reasonable Efforts.\_ In any Y2K action except an action for breach or repudiation of contract, the party against whom the claim is asserted shall be entitled to establish, as a complete defense to any claim for damages, that it acted in good faith and took measures that were reasonable under the circumstances to prevent the Y2K failure from occurring or from causing the damages upon which the claim is based.

(b) Defendant's State of Mind.\_ In a Y2K action making a claim for money damages in which the defendant's actual or constructive awareness of an actual or potential a Y2K failure is an element of the claim, the defendant is not liable unless the plaintiff, in addition to establishing all other requisite elements of the claim, proves by clear and convincing evidence that the defendant knew, or recklessly disregarded a known and substantial risk, that the failure would occur in the specific facts and circumstances of the claim.

(c) Foreseeability.\_ In a Y2K action making a claim for money damages, the defendant is not liable unless the plaintiff proves by clear and convincing evidence, in addition to all other requisite elements of the claim, that the defendant knew, or should have known, that the defendant's action or failure to act would cause harm to the plaintiff in the specific facts and circumstances of the claim.

(d) Control Not Determinative of Liability.\_ The fact that a Y2K failure occurred in an entity, facility, system, product, or component that was within the control of the party against whom a claim for money damages is asserted in a Y2K action shall not constitute the sole basis for recovery of damages in that action.

(e) Preservation of existing law.\_ The provisions of this section are in addition to, and not in lieu of, any requirement under applicable law as to burdens of proof and elements necessary for prevailing in a claim for money damages.

#### SEC. 303. LIABILITY OF OFFICERS AND DIRECTORS.

(a) In General.\_ A director, officer, trustee, or employee of a business or other

organization (including a corporation, unincorporated association, partnership, or non-profit organization) shall not be personally liable in any Y2K action making a tort or other noncontract claim in that person's capacity as a director, officer, trustee, or employee of the business or organization for more than the greater of\_

(1) \$100,000; or

(2) the amount of pre-tax compensation received by the director, officer, trustee, or employee from the business or organization during the 12 months immediately preceding the act or omission for which liability was imposed.

(b) Exception.\_ Subsection (a) does not apply in any Y2K action in which it is found by clear and convincing evidence that the director, officer, trustee, or employee\_

(1) intentionally made misleading statements regarding any actual or potential year 2000 problem; or

(2) intentionally withheld from the public significant information there was a legal duty to disclose to the public regarding any actual or potential year 2000 problem of that business or organization which would likely result in actionable Y2K failure.

(c) State law, charter, or bylaws.\_ Nothing in this section supersedes any provision of State law, charter, or a bylaw authorized by State law, in existence on January 1, 1999, that establishes lower limits on the liability of a director, officer, trustee, or employee of such a business or organization.

#### TITLE IV\_Y2K CLASS ACTIONS

##### SEC. 401. MINIMUM INJURY REQUIREMENT.

In any Y2K action involving a claim that a product or service is defective, the action may be maintained as a class action in Federal or State court as to that claim only if\_

(1) it satisfies all other prerequisites established by applicable Federal or State law or applicable rules of civil procedure; and

(2) the court finds that the alleged defect in a product or service is material as to the majority of the members of the class.

##### SEC. 402. NOTIFICATION.

(a) Notice by Mail.\_ In any Y2K action that is maintained as a class action, the court, in addition to any other notice required by applicable Federal or State law, shall direct notice of the action to each member of the class by United States mail, return receipt requested. Persons whose receipt of the notice is not verified by the court or by counsel for one of the parties shall be excluded from the class unless those persons inform the court in writing, on a date no later than the commencement of trial or entry of

judgment, that they wish to join the class.

(b) Contents of Notice.\_ In addition to any information required by applicable Federal or State law, the notice described in this subsection shall\_

- (1) concisely and clearly describe the nature of the action;
- (2) identify the jurisdiction where the case is pending; and
- (3) describe the fee arrangement of class counsel.

#### SEC. 403. FORUM FOR Y2K CLASS ACTIONS.

(a) Jurisdiction.\_ The District Courts of the United States have original jurisdiction of any Y2K action, without regard to the sum or value of the matter in controversy involved, that is brought as a class action if\_

- (1) any member of the proposed plaintiff class is a citizen of a State different from the State of which any defendant is a citizen;
- (2) any member of the proposed plaintiff class is a foreign Nation or a citizen of a foreign Nation and any defendant is a citizen or lawful permanent resident of the United States; or
- (3) any member of the proposed plaintiff class is a citizen or lawful permanent resident of the United States and any defendant is a citizen or lawful permanent resident of a foreign Nation.

(b) Predominant State Interest.\_ A United States District Court in an action described in subsection (a) may abstain from hearing the action if\_

- (1) a substantial majority of the members of all proposed plaintiff classes are citizens of a single State;
- (2) the primary defendants are citizens of that State; and
- (3) the claims asserted will be governed primarily by the laws of that State.

(c) Limited Controversies.\_ A United States District Court in an action described in subsection (a) may abstain from hearing the action if\_

- (1) the value of all matters in controversy asserted by the individual members of all proposed plaintiff classes in the aggregate does not exceed \$1,000,000, exclusive of interest and costs;
- (2) the number of members of all proposed plaintiff classes in the aggregate is less

than 100; or

(3) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.

(d) Diversity Determination.\_ For purposes of applying section 1322(b) of title 28, United States Code, to actions described in subsection (a) of this section, a member of a proposed class is deemed to be a citizen of a State different from a corporation that is a defendant if that member is a citizen of a State different from each State of which that corporation is deemed a citizen.

(e) Removal.\_

(1) In general.\_ A class action described in subsection (a) may be removed to a district court of the United States in accordance with chapter 89 of title 28, United States Code, except that the action may be removed\_

(A) by any defendant without the consent of all defendants; or

(B) any plaintiff class member who is not a named or representative class member of the action for which removal is sought, without the consent of all members of the class.

(2) Timing.\_ This subsection applies to any class before or after the entry of any order certifying a class.

(3) Procedure.\_

(A) In general.\_ Section 1446(a) of title 28, United States Code, shall be applied to a plaintiff removing a case under this section by treating the 30-day filing period as met if a plaintiff class member who is not a named or representative class member of the action for which removal is sought files notice of removal within 30 days after receipt by such class member of the initial written notice of the class action provided at the trial court's direction.

(B) Application of section 1446.\_Section 1446 of title 28, United StatesCode, shall be applied\_

(i) to the removal of a case by a plaintiff under this section by substituting the term ``plaintiff" for the term ``defendant" each place it appears; and

(ii) to the removal of a case by a plaintiff or a defendant under this section\_

(I) by inserting the phrase ``by exercising due diligence" after ``ascertained" in the second paragraph of subsection (b); and

(II) by treating the reference to ``jurisdiction conferred by section 1332 of this title" as a reference to subsection (a) of this section.

(f) Application of Substantive State Law.\_ Nothing in this section alters the substantive law applicable to an action described in subsection (a).

(g) Procedure After Removal.\_ If, after removal, the court determines that no aspect of an action that is subject to its jurisdiction solely under the provisions of section 1332(b) of title 28, United States Code, may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, the court shall strike the class allegations from the action and remand the action to the State court. Upon remand of the action, the period of limitations for any claim that was asserted in the action on behalf of any named or unnamed member of any proposed class shall be deemed tolled to the full extent provided under Federal law.

